Development & Commercial Bank Bhd v Kredin Sdn Bhd

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR EXECUTION NO 36-9-1992
VC GEORGE J
21 NOVEMBER 1994

Companies and Corporations *— Winding up — Commencement — Whether winding up commences on presentation of petition — Prohibitory order entered against company's land in execution of judgment — Prohibitory order entered after presentation of petition — Whether void — Companies Act 1965 ss 219(2) & 224*

In an action against the defendant, the plaintiff had on 14 April 1989 obtained a judgment for the payment of a substantial sum of money. However, on 14 August 1987, Bank Bumiputra Malaysia Bhd had presented a petition to wind up the defendant. On or about 31 March 1992, with the petition still pending, the plaintiff, with the intention of executing the judgment, had registered a prohibitory order in respect of various lands belonging to the defendant. The defendant applied for a declaration that the prohibitory order was void, contending that the execution put in force was void according to s 224 of the Companies Act 1965 ('the Act') as the winding up was deemed, pursuant to s 219(2) of the Act, to have commenced on the presentation of the petition on 14 August 1987 prior to the putting in force of the execution.

Held, dismissing the defendant's application:

(1) The winding up of a company only commences upon the making of a winding-up order. It is then that the provisions of s 219(2) of the Act come into play, whereby the commencement of the winding up is deemed to have commenced earlier, ie on the presentation of the petition.

(2) The putting into force of execution after the presentation of the petitition will not be void if ultimately the petition is withdrawn, struck off or dismissed. In that situation, the statutory fiction that the winding up had commenced on presentation of the petition will not apply because in fact the winding up never commenced.

(3) In this case, there was a contingent future possible winding up. Therefore, the defendant's application for a declaration that the prohibitory order is void was obviously premature and must be dismissed.

[Bahasa Malaysia summary

Di dalam satu tindakan terhadap defendan, plaintif pada 14 April 1989 telah memperolehi suatu penghakiman untuk pembayaran

sejumlah wang yang banyak. Walau bagaimanapun, terlebih awal, pada 14 Ogos 1987, Bank Bumiputra telah mengemukakan suatu petisyen untuk menggulung defendan. Pada atau kira-kira pada 31 Mac 1992, sementara petisyen itu masih belum diputuskan, plaintif, dengan tujuan melaksanakan penghakiman itu, telah mendaftarkan suatu perintah larangan berkenaan dengan beberapa bidang tanah kepunyaan defendan. Defendan telah memohon untuk suatu deklarasi bahawa perintah larangan itu tidak sah dan menegaskan bahawa pelaksanaan yang dijalankan oleh plaintif itu adalah tidak sah mengikut s 224 Akta Syarikat 1965 ('Akta itu') kerana penggulungan itu dianggap, mengikut s 219(2) Akta itu, sebagai telah bermula apabila petisyen itu dikemukakan pada 14 Ogos 1987 sebelum pelaksanaan itu dimulakan.

Diputuskan, menolak permohonan defendan itu:

(1) Penggulungan sesebuah syarikat bermula pada pemberian perintah penggulungan. Pada masa itu peruntukan s 219(2) Akta itu berkuatkuasa, di mana permulaan penggulungan itu dianggap sebagai telah bermula lebih awal, iaitu pada pengemukaan petisyen itu.

(2) Permulaan pelaksanaan selepas pengemukaan petisyen itu tidak akan menjadi tidak sah jika pada kesudahannya perintah penggulungan itu ditarik balik, dibatalkan atau dibuang. Dalam keadaan sedemikian, rekaan statutori bahawa penggulungan itu telah bermula pada pengemukaan petisyen itu tidak akan terpakai kerana penggulungan itu pada hakikatnya tidak pernah bermula.

(3) Di dalam kes ini, terdapat satu penggulungan yang bakal mungkin berlaku di masa depan. Oleh itu, permohonan defendan untuk suatu deklarasi bahawa perintah larangan itu adalah tidak sah jelasnya pramasa dan mesti ditolak.]

Notes

For cases on companies' winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

AR Goel v First National Bank AIR 1960 Pun 476 (folld)
Fleet Motor & General Insurance Co (Aust) Pty Ltd v Tickle [1984] 2 ACLC 282 (folld)
Miles Aircraft Ltd, Re [1948] 1 All ER 225 (folld)
Pembinaan KSY Sdn Bhd v Lien Seng Properties Sdn Bhd [1991] 1 MLJ 571 (not folld)

Legislation referred to

Companies Act 1965 ss 219(2), 224
Companies Act s 441(2) [Ind]

N Chandran (Adnan Sundra & Low) for the plaintiffs.
KS Narayanan (Jayaraman Ong & Co) for the defendants.

Cur Adv Vult

VC George J: In an action against Kredin Sdn Bhd ('Kredin'), the Development & Commercial Bank Bhd ('D & C Bank') had on 14 April 1989 obtained a judgment for the payment of a substantial sum of money. However earlier, on 14 August 1987, Bank Bumiputra Malaysia Bhd had caused to be presented a petition to wind up Kredin. Later, Overseas Chinese Banking Corp ('OCBC') was substituted as petitioner.

On or about 31 March 1992, with the petition still pending, D & C Bank, with the intention of executing the judgment obtained, had registered a prohibitory order in respect of various lands, the registered owner of which was Kredin.

The contention on behalf of Kredin is that the prohibitory orders are invalid and void in that the execution put in force is void as the winding-up petition had been deemed to have commenced on the presentation of the petition on 14 August 1987 prior to the putting in force of the execution.

Sections 219(2) and 224 of the Companies Act 1965 relied upon are as follows:

> 219(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.
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> 224 Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void.

It was submitted on behalf of Kredin that as the petition to wind up Kredin had been presented on 14 August 1987, the effect of s 219(2) is that the winding up had commenced on that date. It was further submitted on behalf of Kredin that obtaining the prohibitory order amounted to a putting in force of execution after the presentation of the petition and, applying s 224, it was submitted that such execution was void. That the winding-up order had not been made, it appears to be suggested, is neither here nor there.

In *Pembinaan KSY Sdn Bhd v Lien Seng Properties Sdn Bhd* [1991] 1 MLJ 571, reference was made to the effect of ss 219(2) and 224 in the face of a pending petition to wind up. The learned judge appeared to hold that whether the company was eventually wound up or not is not relevant where the execution put in force was after the presentation of the petition. In his judgment, the effect of s 224 was that such an execution is void.

It was submitted on behalf of D & C Bank that that opinion was made obiter in that the real issue in *Pembinaan* was not the effect of ss 219(2) and 224. I do not agree and it follows that I do not agree that that view of the learned judge is obiter dictum.

However with the greatest respect to the learned judge, I find that I cannot share his opinion on the effect of the words in s 219(2), '... shall be deemed to have commenced'. In my judgment, the winding up of a company commences upon the making of the winding-up order whereupon (and only then), comes into play what has been described as a statutory fiction, the provisions of s 219(2), by which the commencement of the winding up, in fact commenced on pronouncement of the winding up order, is deemed to have commenced earlier, on the presentation of the petition.

In India, the section equipolent to our s 219(2) is s 441(2) where the words used are: '... the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for winding up'.

In *AR Goel v First National Bank* AIR 1960 Pun 476 at p 477, Tek Chana J discussed the meaning to be given to 'shall be deemed to commence' and concluded that it provided a statutory fiction. He said with reference of the Indian s 441(2):

> The [Indian] legislature has preferred to use the words 'shall be deemed to commence' instead of 'shall commence'. This is not without significance. These words indicate the mind of the legislature; and what is signified is, that although the winding up of a company does not in fact commence at the time of the presentation of the petition, it nevertheless shall be taken to commence from that stage. In this context the word 'deemed' means, 'suppose', 'considered', 'construed', 'thought', 'taken to be', or 'presumed'. The word 'deemed' refers to 'what is supposed to be', not to 'what actually is'. It rather suggests that something is being assumed as true for certain purposes though really it is not so.
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> Cave J in *R v Norfolk County Council* (1891) 60 LJQB 379 said:
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> > 'Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing.'
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> Griffith CJ of the High Court of Australia in *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at p 696 said:
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> > 'The word "deemed" is more commonly used for the purpose of creating more of a "statutory fiction" than is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced.'

In *Fleet Motor & General Insurance Co* [1984] 2 ACLC 282 at p 284, referring to a similar provision in New South Wales, the learned judge said:

> It has been submitted for the defendant that the use of the expression 'is commenced to be wound up' and the tortured grammar which such use involves in each of these provisions indicates that the legislature intended

A that those words should have the technical meaning which it is said they have in company law in the case of a winding up by order of the court, namely, that the winding up is to be 'deemed to have commenced at the time of the filing of the application for the winding up'.

The learned judge went on to say at 285:

B A compulsory winding up does not in fact commence until the winding-up order is made by the court. Once the order is made, the winding up is to be 'deemed to have commenced' at the earlier date. In this context the word 'deemed' is used to create a statutory fiction ...

In *Re Miles Aircraft Ltd* [1948] 1 All ER 225, it was explained by Vaisey J C that the deeming aspect of the matter cannot but come into play until after the winding-up order is made, tellingly pointing out that it was always possible that the petition might ultimately be withdrawn or be dismissed.

It seems to me that the putting into force of execution after the presentation of the petitition will not be void if ultimately the petition is withdrawn and struck off or is dismissed. In that situation, the statutory D fiction that the winding up had commenced on presentation of the petition will not apply because in fact the winding up never commenced.

All that we had here when the application was made and heard, was a contingent future possible winding up. The instant application which in effect is for a declaration that the prohibitory order is void, is obviously E premature. It has to be dismissed.

No doubt that since there is that contingent future possible winding up, where the court's assistance is sought, a measure of relief will in most cases be given perhaps by way of conditional orders to ensure that the status quo is maintained pending the outcome of the petition.

F As to the instant application, encl 11, it is dismissed with costs to be taxed and paid forthwith.

Application dismissed.

G Reported by Kevin Ooi

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